Southwind Development Sdn Bhd v Hass Plantation Sdn Bhd

HIGH COURT (MIRI) — ORIGINATING SUMMONS NO MR 36 OF 1995
RICHARD MALANJUM J
12 OCTOBER 1995

Contract — Rectification — Mutual/common mistake — Whether rectification should be allowed — Elements to be established — Specific Relief Act 1950 s 30

The plaintiff applied by an originating summons for an order that the written undated agreement between the plaintiff and the defendant ('TCF-1') be rectified pursuant to s 30 of the Specific Relief Act 1950 ('the Act'). It was the case of the plaintiff that there was a mutual mistake when the relevant clauses in TCF-1 made references to the words 'Estate Owner' instead of 'Employer'. The defendant contended that there was no mutual mistake and that therefore rectification should not be allowed. The defendant further contended that even if there was mutual mistake the matter should go for trial since it was a question of fact. The issues before the court were (i) what were the elements to be established before rectification would be allowed; and (b) whether the evidence adduced sufficiently made out a case for rectification.

Held, allowing the plaintiff's application:

(1) It is common ground that before any rectification can be made there must have been incidence of mutual mistake. This is reflected in ss 30–32 of the Act (see pp 88H–89B); *Lim Hong Shin v Leong Fong Yew* (1922) 2 FMSLR 187 followed.

(2) The mistake of one party to a contract is not a good ground for rectification. For a mistake to be mutual, it must be common to both parties and it is essential that the parties should have had precisely the same intention on the point on which the document is inaccurate. In a proper case the court will amend the language of an instrument for the purpose of making it accord with the true intention of the parties, having ascertained what that intention was and also that the words as they stand fail to express it (see p 89D–E).

(3) In deciding whether mutual mistake has been made out the court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement and must enquire on the intention of the agreement and its intended legal consequences and not confine the enquiry to what the language of the instrument was intended to be. The case for rectification must be made out having regard to the evidence and circumstances of the case (see p 89F–G); *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159 followed.

[Bahasa Malaysia summary

Plaintif telah memohon melalui saman pemula untuk perintah bahawa perjanjian bertulis yang tidak bertarikh di antara plaintif dan defendan ('TCF-1') dibetulkan menurut s 30 Akta Relief Spesifik 1950 ('Akta itu'). Adalah merupakan kes plaintif bahawa wujudnya suatu kesilapan bersama apabila klausa-klausa tersebut merujuk kepada 'Estate Owner' dan bukan 'Employer'. Defendan telah menegaskan bahawa tidak terdapatnya kesilapan bersama dan oleh kerana itu pembetulan tidak sepatutnya dibenarkan. Defendan selanjutnya menegaskan bahawa walaupun terdapatnya kesilapan bersama, ianya sepatutnya dibicarakan kerana ia merupakan persoalan fakta. Isu-isu di hadapan mahkamah adalah (i) apakah unsur-unsur yang perlu didirikan sebelum pembetulan dapat dibenarkan; dan (ii) sama ada keterangan yang dikemukakan adalah memadai untuk menunjukkan suatu kes untuk pembetulan.

Diputuskan, membenarkan permohonan plaintif:

(1) Adalah perkara biasa bahawa sebelum pembetulan dapat dibuat, satu kesilapan bersama mestilah wujud. Ini adalah dibayangkan dalam ss 30–32 Akta itu (lihat ms 88H–89B); *Lim Hong Shin v Leong Fong Yew* (1922) 2 FMSLR 187 diikut.

(2) Kesilapan sebelah pihak kepada perjanjian bukan merupakan satu alasan yang baik untuk membuat pembetulan. Untuk satu kesilapan menjadi satu kesilapan bersama, ianya harus sama kepada kedua-dua belah pihak dan adalah perlu bahawa kedua-dua belah pihak telah mempunyai niat yang sama atas perkara mengenai mana dokumen itu adalah tidak betul. Dlam kes yang berkenaan mahkamah akan meminda bahasa sesuatu suratcara untuk tujuan membuatnya sehaluan dengan niat benar pihak-pihak, setelah menentukan apakah niat itu dan juga bahawa perkataan-perkataan sepertimana yang tertulis telah gagal untuk menyatakannya (lihat ms 89D–E).

(3) Apabila memutuskan sama ada kesilapan bersama telah ditunjukkan mahkamah mesti berpuas hati bahawa kesemua pihak-pihak di situ berniat untuk membuat suatu perjanjian adil serta jujur dan mesti bertanya mengenai niat perjanjian itu dan akibat undang-undang yang diniatkan dan tidak menghadkan pertanyaan itu kepada apakah yang diniatkan oleh bahasa suratcara itu. Kes untuk pembetulan mesti ditunjukkan dengan mengambilkira keterangan serta hal-hal keadaan kes (lihat ms 89F–G); *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159 diikut.]

[*Editorial Note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No Q–02–683–95.]

Notes

For cases on mutual or common mistake, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1919–1914.

Cases referred to

Lim Hong Shin v Leong Fong Yew (1922) 2 FMSLR 187
Oh Hiam & Ors v Tham Kong [1980] 2 MLJ 159

Legislation referred to

Rules of the High Court 1980 O 7 r 3(1)
Specific Relief Act 1950 ss 30, 31, 32

Matthew Chan (*Chan Kho Loy & Co*) for the plaintiff.
Lin Kuan Yuh (*Kadir, Wong, Lin & Co*) for the defendant.

Cur Adv Vult

Richard Malanjum J: By an originating summons dated 14 June 1995 (encl 2) the plaintiff is applying pursuant to s 30 of the Specific Relief Act 1950 ('the Act') for the following orders, namely, (verbatim):

(1) That the written undated Agreement between the parties be rectified by substituting the words, 'the Employer', for the words, 'the Estate Owner', in Clauses 8, 9, 10, 11, 12, 20, 21, 22, 23, 24, 25, 26 and 28 of the General Conditions of Contract of the said Agreement, as shown by underlining in 'red' on the General Conditions of Contract annexed hereto and marked 'A'.

(2) Further or other relief; and

(3) Costs.

The application is supported by the following affidavits:

(a) the affidavit in support by Tay Choo Foo affirmed on 27 May 1995 (encl 3); and

(b) the affidavit in reply of Tay Choo Foo affirmed on 10 July 1995 (encl 10).

There is also a statement pursuant to O 7 r 3(1) of the Rules of the High Court 1980 ('RHC') filed together with the application.

The defendant opposes this application and has filed an affidavit by Chan Yitt Fong affirmed on 7 July 1995 (encl 8). Thus, it is obvious that the subject matter of this application is the written undated agreement purportedly entered into between the plaintiff and the defendant and exhibited as TCF-1 in encl 3.

Briefly, TCF-1 is an agreement executed to regulate the performance of the works as listed in the Schedule of Rate therein and which would have ultimately turned the 4,856 hectares of agricultural land described as Lot 62, Sawai Land District, Miri and situated at Batang Suai, Niah ('the land') into an oil palm estate. And although the first recital of TCF-1 refers to the employer being desirous of developing the land, it is not in dispute that the owner of the Land is Seatex Development Sdn Bhd ('Seatex').

In submitting that there was inadvertence in the usage of the words 'Estate Owner' instead of 'Employer' when TCF-1 was prepared by the

plaintiff without any professional help, learned counsel for the plaintiff advanced the following points, in summary: A

(a) that in dealing with their contractual relationship the plaintiff and the defendant had relied upon TCF-1 as evidenced by the notices issued by the defendant to the plaintiff ('TCF-2' and 'TCF-3' of encl 3) and from the exchange of correspondence between the parties or their solicitors; B

(b) that the conduct of the defendant in the course of the performance of works by the plaintiff reflected reliance upon TCF-1;

(c) that no prejudice will be suffered by the defendant if TCF-1 is rectified as applied since the words to be rectified are descriptive terms only; C

(d) that the defendant did not question the identity of the plaintiff who was performing the works; and

(e) that without the rectification as applied for the plaintiff will be unable to initiate arbitration proceedings. D

Accordingly, it is the case of the plaintiff that there was a mutual mistake when the relevant clauses in TCF-1 made references to 'Estate Owner' instead of 'Employer'.

In opposing the application, learned counsel for the defendant contended the following, briefly: E

(a) that the matter should go for trial due to the dispute of facts involved, such as the tampering of TCF-1 which would affect its admissibility;

(b) that there was no mutual mistake or evidence of such as the defendant accepted the meanings of the words as found. And even if there was the matter should go for trial, being a question of fact; F

(c) that in those instances where the defendant acted as the 'Estate Owner' it was due to wrong impressions after the signing of the agreement TCF-1;

(d) that the plaintiff should go for arbitration in view of cl 28 of TCF-1; and G

(e) that rectification should only be allowed if there was mutual mistake. However, there was none in this case.

From the submissions of learned counsel for the parties it is common ground that before any rectification can be made on TCF-1 there must have been an incidence of mutual mistake (see also *Lim Hong Shin v Leong Fong Yew* (1922) 2 FMSLR 187). And that will necessarily relate to the relevant provisions in the Act, namely: H

> 30 When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified: and if the court finds it clearly proved that there has been fraud or mistake in framing the instrument, and ascertains the real intention of the parties in executing the same, the court may in its I

A discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

31 For the purpose of rectifying a contract in writing, the court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

B 32 In rectifying a written instrument, the court may enquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the enquiry what the language of the instrument was intended to be.

Thus, it is accepted that:

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> '... to establish a right of rectification of a document it is necessary to show that there has been either fraud or common mistake and that rectification will not be granted unless it is distinctly claimed. This does not affect the jurisdiction of the court to correct manifest or undisputed errors without any formal rectification. The mistake of one party to a contract is not a ground for rectification.'

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Further, for a mistake to be mutual, it 'must be common to both parties, and it is essential that the parties should have had precisely the same intention on the point on which the document is inaccurate.' Indeed, I do not think it is subject to challenge that 'in a proper case the court will amend the language of an instrument for the purpose of making it accord with the true intention of the parties, having ascertained what that intention was and also that the words as they stand fail to express it' (see *Pollock & Mulla on Indian Contract and Specific Relief Acts* (10th Ed) at pp 1038, 1040).

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F Accordingly, it is for this court to find if mutual mistake has been made out bearing in mind that in doing so it must be:

(a) 'satisfied that all the parties thereto intended to make an equitable and conscientious agreement' (s 31 of the Act); and

(b) to enquire the intention of the agreement and its intended legal consequences and not to confine the enquiry to 'what the language of the instrument was intended to be' (s 32 of the Act).

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In short, the case must be 'sufficiently made out for purposes of rectification by the evidence and all the circumstances of the case', per Lord Russell of Killowen in *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159 at p 164.

H Incidentally, from the nature of the submissions of the learned counsel for the defendant it can also be viewed that the defendant is now disputing that TCF-1 should be the agreement governing its relationship with the plaintiff at all material times. But having perused TCF-1, the notices issued by the defendant to the plaintiff (TCF-2 and TCF-3), the correspondence between the solicitors of the parties (TCF-4 to TCF-12), the contents of TCF-13 and TCF-14 of encl 10 and also the contents of encl 8, I have no doubt that firstly, TCF-1 must have been the only agreement entered into by the parties. Secondly, that in the course of the performance of works pursuant to the agreement, the defendant knew that

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the plaintiff was involved and in fact dealt with the plaintiff. For instance, TCF-2 and TCF-3 were notices issued by the defendant and which were clearly addressed to the plaintiff. Further, TCF-14 went on to confirm that the plaintiff was involved in the performance of the works stipulated in TCF-1. Thus, there is no basis to ignore the relevance of TCF-1 in considering the contractual relationship of the plaintiff and the defendant in this case. In any event the defendant did not produce any other document to substantiate its contention. As to the allegation that TCF-1 was tampered with and was thus no longer applicable as between the parties, for the same reasons hereinabove, I find that to be without any merit. If the defendant had been consistent in its stand on that issue, then the notices issued (TCF-2 and TCF-3) should have been addressed to the party which it is now claiming to be the proper one, namely, Southwind Sdn Bhd. In fact, even in the letters from the firm of solicitors acting for the defendant (TCF-5 and TCF-7) there was no indication of any such stand. It was only in encl 8. However no explanation was given as to why on 18 November 1994 (TCF-2) and on 28 December 1994 (TCF-3) these notices were addressed to the plaintiff when it was admitted that on 6 October 1994 photostated copies of TCF-1 had been given to the defendant. It would be unreasonable and unfair on the part of the defendant to now raise such an issue when in the course of the performance of the agreeement and in dealing with the plaintiff it was shown that the plaintiff was the proper party and that the agreement was the governing document as between the parties. In my judgment the issue of tampering TCF-1 does not arise as a disputed fact insofar as this present application is concerned. Hence, there is no question for this application to be remitted for trial.

Having said the above I must now turn to address the issue of whether the elements as stipulated by the law have been satisfied in order to allow rectification on the ground of mutual mistake.

Based on the material before me and as discussed hereinabove I am satisfied on a balance of probabilities that TCF-1 was intended to be an equitable and conscientious agreement. The terms therein and the conduct of the parties in ensuring its performance indicated that intention. I find no challenge from the defendant on that point.

And I have no doubt, having considered the relevant provisions of 'TCF-1' and the material before me, that the words 'Estate Owner' appearing in those provisions mentioned by plaintiff in this application do not reflect the intended purpose of the parties. For instance, cl 12 of TCF-1 reads:

> The Contractor shall not without the written consent of the Estate Owner first obtained/assigned (sic) this Contract or Sub-Contract, all or any portion of the Works; provided that such consent shall not be unreasonably withhold (sic) to the prejudice of the Contractor. In the event of all or any portion of the Works being sub-contracted with the written consent of the Estate Owner, the Contractor shall be solely and personally responsible for the due observance by such authorized sub-contractors of all the terms, stipulations and conditions herein expressed.

A Yet in its notice (TCF-3) the defendant alleged that the plaintiff had breached cl 12 as it did not obtain the consent of the defendant before sub-contracting the work. If therefore the words 'Estate Owner' appearing in cl 12 should be given its ordinary meaning as contended by the learned counsel for the defendant, then the defendant had no business to issue the
B notice. However, at the same time Seatex would have had no interest in the matter as the agreement was only between the plaintiff and the defendant. Clearly therefore, the use of the words 'Estate Owner' in cl 12 of TCF-1 was intended to describe the position of the defendant as the 'Employer'.

It is interesting to note that the word 'Employer' was hardly used in
C the 'Conditions of Contract' of TCF-1 when it was supposed to be an agreement between the plaintiff and the defendant. To agree therefore to the contention of the learned counsel for the defendant that there was no mutual mistake would render TCF-1 irrelevant. But that was not the intention of the parties based on the evidence as presented before this
D court.

I have also considered the other arguments of the learned counsel for the defendant. With respect, I find no merit in them.

Accordingly, I allow this application (encl 2) and grant prayer (1) in terms thereof. I also order costs against the defendant to be taxed.

E *Application allowed.*

Reported by Izzaty Izzuddin

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